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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

 Plaintiff,

 vs.

 David Allen Harbour,

 Defendant.

Case No. 2:19-cr-00898-DLR

**REPLY TO GOVERNMENT
 RESPONSE TO DEFENSE MOTION
 TO STAY FORFEITURE
 PROCEEDINGS**

"Criminal forfeiture focuses on the disgorgement of a defendants ill-gotten gains." *United States v. Shkreli*, 779 Fed. Appx 38 41 (2nd Cir. 2019). "Criminal forfeiture operates in personam against a defendant to divest him of his title to proceeds from his unlawful activity as a consequence of his criminal conviction." *United States v Lazarenko* 476 F. 3d 642, 647 (9th Cir. 2007). Convicted defendants must forfeit "tainted property" - "property flowing or used in the crime itself," which "the defendant himself actually acquired as a result of the crime." *Honeycutt v United States*. 581 U.S. 554, 137, S. Ct. 1626, 1632, 198 L. Ed. 2d 73 (2017).

The items about which the parties are in dispute were all proven, by unrebutted government testimony, to have been acquired years before the crimes outlined in the crimes of conviction. It is beyond peradventure that jewelry and watches and gold club memberships acquitted years before the alleged fraud against Burg and Turasky, which

1 are the sole crimes of conviction, cannot have been the ill-gotten gains of the crimes of
2 conviction.

3 Therefore the sole basis for proceeding against the property that was seized is as
4 untrammelled, pure, non-fraudulent conduct, “substitute assets.” Forfeiture of substitute
5 assets is authorized up to the value of forfeitable property that cannot be located, has been
6 sold, or deposited with a third party. *See, United States v. Nejad*, 933 F.3d 1162, 1165 (9th
7 Cir. 2019). The substitute assets need not be traceable to the criminal proceeds of the
8 crime. *United States v. Ripinsky*, 20 F.3d 359, 362 (9th Cir. 1994).

9 The document trail starts with Doc. 801 filed 11/6/2023. The defense had argued
10 that the Court could only forfeit property connected with convicted conduct. The Court
11 stated that it could order the forfeiture of proceeds of uncharged conduct “that,
12 nonetheless, was part of the same scheme alleged in the counts of conviction.” But, we
13 now know, based upon other rulings, that there was no prior conduct that was part of the
14 same scheme alleged in the counts of conviction. Although, for sentencing purposes, in
15 ruling we think on sound bases will be reversed, the Court found that PAIF, Cathey, and
16 Carol Hill constituted uncharged conduct that could be and was considered for
17 enhancement to offense severity under the Guidelines and for restitution – as yet unstated
18 – the trial proved *absolutely* that the property in question and listed in Doc. 801 (and
19 again in Doc. 853) long-predated PAIF, Cathey, and Hill. The basis for the order of
20 forfeiture with respect to the Items listed in ¶2 (a)-(k) is flatly wrong.

21 I.R.S. Agent Green showed, with great exactitude the source of those items. They
22 came from gross revenue Harbour received in 2011-2012 or earlier. That is, from
23 activities that were not only no part of any charge of conviction but, more importantly,
24 were not shown to be fraudulent at all. The Court specifically excised from inclusion in
25 sentencing anything connected with the proceeds Harbour received as a result of dealings
26 with Bobrow, Jackson, Gray, KSQ and Canyon Road. All of the items of Abby Harbour’s
27 jewelry, which lie at the core of the controversy, were obtained during the pre-Operation
28

1 Choke Point days and were either Abby Harbour's sole and separate property because
 2 they were gifts from her husband or were community property in which Abby Harbour's
 3 undivided one-half interest cannot be severed for *forfeiture* purposes.¹

4 Therefore, the sole basis for permitting forfeiture of the jewelry and other items is
 5 "substitute assets." In Doc. 853, the Court amended Doc. 801 and changed or added 21
 6 U.S.C. §853(p) as a basis for forfeiture.

7 Forfeiture of substitute assets is only allowed when the ability to trace and locate
 8 the proceeds of the fraud was substantially impaired by the very manner in which
 9 Harbour committed the crimes that form the basis for forfeiture. The government can
 10 only forfeit substitute property as a result of any act or omission of the defendant.

11 (a) cannot be located upon the exercise of due diligence

12 (b) has been transferred or sold to, or deposited with a third party

13 (c) has been placed beyond the jurisdiction of the court

14 (d) has been substantially diminished in value, or

15 (e) has been commingled with other property which cannot be divided without
 16 difficulty

17 When this reaches the 9th Cir. it is more than likely they will agree that Harbour
 18 does not meet any of these requirements to allow the government to forfeit substitute
 19 property. The government traced and located all the money. Its newly minted, BFF, Phil
 20 Burgess, the lead defendant in a \$75 million fraud suit brought by the SEC in the District
 21 of New Jersey, has all of Oak Tree's money, meaning that it has all of Burg's and
 22 Turasky's money all of which is within the jurisdiction of the Courts of the United States.
 23 It did not diminish in value, and it was not commingled with other property. Most
 24 importantly, Harbour committed no acts or omissions by that allows the government to

25
 26 ¹ The government made reference to third-party claims but did so as if there had been
 27 none filed. Nor does service of Doc. 927 show its service on Abby Harbour. However,
 28 Abby Harbour did file a third-party claim within the period in which she was allowed to
 do so. We have seen no disposition as to Abby Harbour's claim.

1 forfeit substitute property. To the extent the Court found, without any explanation, that
2 the government had done so, respectfully, the Court erred, and we expect the 9th Circuit
3 to so find.

4 "Prosecutorial misconduct amounting to a due process violation limits the
5 government's power to seek criminal forfeiture." *Libretti v. U.S.* 516 U.S. 29, 42-47, 116
6 S. Ct. 356 133 L.Ed. 2d 271 (1995) "Egregious misconduct occurs when the prosecutor's
7 manipulation of evidence is likely to have an important effect on the jury's
8 determination." Quoting *Donnelley v DeChristoforo* 416 U.S. 637 647 94 Ct. 1868 40
9 L.Ed. 2d 431 (1974)

10 The government misrepresented the evidence to the court over 100 times. Its
11 prosecutor told the court he had evidence he never really had. He also represented to the
12 court it would hear testimony from government witnesses that would support his proffers
13 and evidence. At the trial the government witnesses' testimony refuted the prosecutor's
14 proffers and proved he made misrepresentations to the court. These false representations
15 were intentional and manipulated the court into allowing testimony into the trial that
16 should never have been allowed. This prosecutorial misconduct was a due process
17 violation against Harbour and under the 9th Cir. legal authority will limit the
18 government's power to seek criminal forfeiture.

19 The 9th Cir. ruled, in a money judgment it is the amount "received in connection
20 with the commission of the crime." The purpose is to "eliminate the gains realized from
21 criminal activity." U.S. v Casey 444 F.3d 1071 (9th Cir. 2006) The 9th Cir. will see that
22 Harbour did not receive any money with respect to Cathey and Hill's, therefore there are
23 no "amounts" or "gains" realized to be forfeited. FBI FA Paige and Purifoy testified
24 100% of Cathey and Hill's money went to KSQ and none of it was diverted to Harbour.
25 Under the legal authority of the 9th Cir. Harbour did not have gains from Hills and
26 Cathey to eliminate and award forfeiture. With respect to Burg and Turasky, Paige traced,
27 located, their money too. It was transferred to the investment, Green Circle, and to
28

1 Harbour's entities that incurred the cost of Harbour's operations as testified to by IRS
2 Agent Green, Laura Purifoy, Cathie Cameron and certified by the IRS in their settlement
3 as shown in Document 841-1 Attachment D. Harbour did not have any ill-gotten gains
4 from Burg and Turasky under the legal authority of the 9th Cir. and 18 U.S.C. Section
5 981(a)(2)(B) to award forfeiture.

6 The prosecutor admitted under questioning by the court the property it has in its
7 possession and wants to use as substitute property was purchased with Harbour's Gross
8 Income (FBI FA Paige Exhibit 918), that is the over \$30 million received from KSQ and
9 Canyon Road, none of which was proven to be the money of any lender or investor.
10 Indeed, the prosecutor told the court that Harbour's Gross Income was not probative to
11 any material fact in the case.

12 In addition, the substitute property also belongs to Abby Harbour, who is an
13 innocent spouse. "A court may not order forfeiture of property of an innocent spouse."
14 *U.S. v Lester*, 85 F.3d 1409, 1412 (9th Cir. 1996) Abby Harbour has a 100% interest in
15 her property and a 50% interest in the other substitute property under the community
16 property laws of the State of Arizona. "State law determines whether claimants have
17 property interest." *U.S. v Hooper*, 229 F.3d 818 at 820 (9th Cir. 2000)

18 If the court does include substitute property, it shall conduct an ancillary
19 proceeding "if a third party files a petition claiming an interest in the property." Rule
20 32.2(e)(2) and 21 U.S.C. Section 853(n). Abby Harbour filed a petition with the court
21 that she has a 50% interest in the substitute property that is not her sole and separate
22 property she received as a gift from Mr. Harbour.

23 The court has not yet granted this hearing yet, but when it does this hearing will be
24 short because the prosecutor told the court that the jewelry was purchased with Harbour's
25 Gross Income, and this was also shown in Exhibit 918. There is no fraud associated with
26 Abby Harbour receiving her jewelry as a gift from Mr. Harbour and her ownership of the
27 jewelry as community property. This admission by the prosecutor of Harbour's Gross
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1 Income having no probative value to any material fact in the case was months after the
2 forfeiture hearing, another misrepresentation by the prosecutor that hamstrung the court
3 in making its forfeiture order.

4 Since the substitute property is not tainted property and per the admission of the
5 prosecutor it was righteously purchased by Mr. Harbour and is either community
6 property or a gift to Abby Harbour, the court must look to the legal authority of *Lester*,
7 *supra.*, and order the government to return all of the substitute property back to Abby
8 Harbour.

9 Not only is this property not tainted, but it served no purpose to any material fact
10 in the case, therefore it cannot be related to any victim in the case. If it is not related to
11 any victim, there cannot be any nexus to any victim. As we have repeatedly told the
12 court, the gross income is all over the case against Harbour. The gross income is the non-
13 existent finder's fee which is the alleged fraud of Cathey and the Hills. The gross income
14 is the money in 2014 that Harbour used to front all the expenses he incurred to operate
15 and build Oak Tree through his related entities, which were then reimbursed with Burg
16 and Turasky money. Per the IRS the gross income came the exact same entities that
17 Harbour transferred Burg and Turasky money as FBI FA Paige proved with her exhibits.
18 Harbour's Gross Income having nothing to do with the government's case against
19 Harbour means Harbour did not commit fraud against Cathey, Hill, Burg and Turasky
20 and did not have any ill-gotten gains and did not have any tainted property.

21 **Allowable Expenses Are to Be Subtracted From Forfeited Amounts**

22 The Court ordered forfeitures based upon four alleged victims: Cathey, which will
23 fall away when the November 1, 2024 Guidelines amendments are deemed retroactive;
24 Carol Hill, the same, and Burg and Turasky where the expenses are greater than the total
25 of their loans/investments. The 5th Cir. defined "direct cost" as "all the variable costs that
26 can be specifically identified as cost of performing the contract." *U.S. v Landers*, 68 F.3d
27 882, 884 n.2d (5th Cir. 1995)
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1 IRS Agent Lionel Green who audited Harbour for tax years 2010 - 2014, testified
2 Harbour's expenses were directly related to his business, therefore they are direct cost.
3 The 2014 Tax Returns Schedules C and E showed about \$1.4 million in expenses for
4 2014. The Defense expert reached the same total. The IRS stipulated and agreed, post-
5 trial, to this expense figure. Where the government misled the Court, and the Court, thus,
6 erred, was when the Court conflated "gross receipts" with "net income." The Court
7 determined, wrongly, that because Harbour had no *net income* in 2014, his use of Burg
8 and Turasky funds for "business expenses" was fraudulent. Without net income, the
9 Court stated, there could be no proper business expenses. Standing alone, but it hardly
10 stands alone, this error should be sufficient to reverse the case on appeal.

11 The Pujanza Management LLC Operating Agreement allowed the Manager to be
12 reimbursed for cost incurred. The declaration and Settlement Agreement signed by Rich
13 Turasky stated Harbour was the Manager and could use the funds loaned by Turasky to
14 reimburse expenses that had been incurred at his discretion.

15 Fed. R. Crim. P. 32.2(b)(1)(B) - To determine the nexus, the court may rely on
16 evidence admitted at trial as well as additional relevant and reliable evidence. The court
17 did not consider the 2014 Tax Return Schedules C and E as relevant and reliable
18 evidence when it determined the forfeiture for Burg and Turasky. The court did not
19 consider the language in the Pujanza Management Operating Agreement specifically
20 stating the Manager, Harbour, could use the money to reimburse expenses that had been
21 incurred. The court did not consider Doc. 841-1 Attachment D showing the transfers of
22 Burg and Turasky \$695,000 to reimburse expenses that had been incurred. Doc 841-1
23 Attachment D aligns directly with the testimony of Burg, Turasky, Purifoy, IRS Agent
24 Green and Cathie Cameron. The testimony of each witness, along with the 2014 Tax
25 Return prove Harbour did not use Burg and Turasky money to pay for personal expenses,
26 buy tainted property, or that the transfers were illegal or ill-gotten gains. The court did
27 not explain why it ignored this evidence.
28

1 Joe Cathey - There were no illegal or unlawful Proceeds attained by Harbour, nor
2 any illegal transactions under the case law. The evidence proved Harbour did not acquire
3 any money from Cathey, let alone illegally. Harbour never met Cathey, never talked to
4 him, never solicited him, never called, emailed, or texted him, never had a bargain with
5 him, and never controlled or possessed his money. (FBI FA Paige testified Harbour was
6 not a signer on the NorthRock bank account. There is no evidence of Harbour ever using
7 the wire with Cathey to meet the elements of wire fraud) Under *Milheiser* there was no
8 bargain between Harbour and Cathey.

9 Carol Hill - The same case law that applied to Cathey also applies to Hill. Harbour
10 was acquitted on Carol Hill, which negates forfeiture. Hill testified she did not give
11 Harbour her \$81,000, she gave it to Dunsworth same as Cathey. Paige testified she did
12 not trace \$81,000 from Carol Hill into the NorthRock bank account. Without the tracing
13 of any money, there cannot be any ill-gotten gains or fraud. Paige and Purifoy both
14 testified that 100% of Hill's \$500,000 loan went to KSQ, it was not wrongfully
15 transferred nor diverted to Harbour, which is required under *Monterey*. Hill testified she
16 wanted the high interest rates. Hill got exactly what she bargained for, there was no lie or
17 misrepresentation about the nature of the bargain which is required under *Milheiser*. As
18 with Cathey, there is no evidence the money Harbour received from KSQ, Harbour's
19 Gross Income, came from Hill's \$500,000 loan which is required for wire fraud under
20 *Lew*.

21 The court stated at the 6/6/23 hearing the government shut down the lending
22 operations and that is why the lenders lost their money. This relates to forfeiture due to
23 the nature of the bargain under *Milheiser*. Cathey and Hill lost their money due to
24 Operation Choke Point not because of any lie about the nature of the bargain. Further
25 supporting there was no wire fraud and therefore no forfeiture or restitution.

26 Turasky - the court committed plain error awarding Turasky forfeiture. The
27 government admitted that Turasky did not have any loss for restitution and Turasky
28

1 testified he had been paid all of his money, and he did not have a loss. 18 U.S.C. Section
2 981(a)(2)(C) - "In cases involving fraud in the process of obtaining a loan or extension of
3 credit, the court shall allow the claimant a deduction from the forfeiture to the extent the
4 loan was repaid, or the debt was satisfied, without any financial loss to the victim." Per
5 the statute, Turasky is not eligible for forfeiture.

6 Burg has multiple issues when it comes to forfeiture. The evidence proved
7 \$600,000 of Burg's money went to the investment and the remaining \$400,000 was used
8 to reimburse expenses that Harbour had incurred. Per document 841-1 Attachment D and
9 the case law, Harbour did not commit wire fraud against Burg. It also supports Burg and
10 Turasky money was not used for money laundering in 18 U.S.C. 1956 and 1957. Paige
11 traced Burg's money to the investment and to Harbour's related entities, these entities
12 incurred the cost to operate Harbour's business per the testimony of IRS Agent Green,
13 Purifoy and Cameron. Agent Green called the transfers that Paige traced as "inter-
14 company transfers" and Purifoy called them "due to due froms" both are legal and
15 commonly used in business. This came to completion when the IRS in its Settlement filed
16 in Tax Court on 11/13/2023 allowed \$1.4 million of business expenses to the same
17 entities that Harbour transferred Burg and Turasky's \$695,000. Therefore, there was no
18 lie about the nature of the bargain on how Harbour would use their money. In addition,
19 the IRS Settlement proved there was no wrongful transfer of Burg and Turasky's money
20 under Monterey. Not only were there no ill-gotten gains, but there was also no wire fraud
21 per the case law.

22 The Supreme Court, in *U.S. v Santos*, 553 U.S. 507 (2008), defined proceeds as
23 profits to eliminate the merger problem. The IRS in their final audit of Harbour for 2014
24 did not consider the \$400,000 of Burg and the \$295,000 of Turasky that Harbour used to
25 reimburse expenses as profits or gross income.

26 We expect the case to be reversed in its entirety and think the Circuit will, at a
27 minimum, remand the case for resentencing. If the government proceeds at any point in
28

1 time before the Circuit has completely disposed of the appeal to sell off Abby Harbour's
2 jewelry, we hope the Court will someday order the prosecutors to retrieve or replace it.

3 We do not dispute that the government can proceed along the path of forfeiture
4 with respect to third-party claims but, even if it successful, the chances of reversal are so
5 profound that the Court should nonetheless stay any property disposition.

6 RESPECTFULLY SUBMITTED this 13th day of August 2024.

7
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9
10 By: /s/ Stephen M. Dichter

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16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on August 13, 2024 I electronically transmitted the attached
18 document to the Clerk's Office using the CM/ECF system for filing and for transmittal
19 of Notice of Electronic Filing to the following CM/ECF registrants:

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